

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

EXPLORICA, INC.

Plaintiff,

v.

ELDERHOSTEL, INC.
d/b/a EXPLORITAS,

Defendant.

Civil Action No. 09-11719-RGS

**PLAINTIFF EXPLORICA, INC.'S OPPOSITION TO ELDERHOSTEL'S MOTION TO
PRECLUDE EXPLORICA FROM INTRODUCING AS EXHIBITS
ANY WEB PAGES WHICH ARE NOT ON ITS EXHIBIT LIST [Dkt. No. 59]**

Elderhostel, Inc.'s Motion to Preclude Explorica from Introducing as Exhibits any Web Pages Which are Not on its Exhibit List is disingenuous. When the parties exchanged exhibit lists, Explorica did indeed list the websites (www.explorica.com, www.exploritas.org, www.espiritour.com, and www.smithsonianjourneys.org). Explorica did so, because it intended to demonstrate to the jury what the navigation of the website looks like to ensure they appreciate the real-world experience rather than being handed photocopies of screenshots. Explorica would still prefer to use live web access at trial and does not think this request is unreasonable. Further, Explorica is willing to provide the lists and screenshots of the pages it intends to navigate through at trial.

This was never an instance of "trial by ambush." In fact, when counsel for the parties met on Sunday, February 7, 2010, counsel for Explorica stated that they would provide copies of any screenshots that Explorica was going to enter into evidence. Counsel for Elderhostel indicated that this was unacceptable. During all of these discussions, Elderhostel's counsel has maintained that everything from the parties' websites should be admissible.

After Monday's hearing, counsel for Explorica suggested that the parties arrive at a compromise under which Explorica would capture and save html files corresponding to certain website pages and produce those electronic files and screenshots thereof by Thursday or Friday of this week. Elderhostel's counsel indicated that this may be acceptable, but they needed to review the files. Explorica intends to identify the individual pages today—February 11, 2010—and produce them soon thereafter in html and screenshot format. In addition, the joint exhibit list entries have been edited to indicate the following:

Explorica Website available at www.explorica.com in the form of an electronic copy of certain pages from website as they existed on a specific capture date, accompanied by certain other links within the website as they existed on that same date and capable of simulated web interaction. Folders containing electronic copies of these website pages and screenshots of website pages shall be produced by Friday, February 12, 2010.

Elderhostel's claims that Explorica is attempting to "hide its trial exhibits" should be dismissed out of hand given that Elderhostel has included several "placeholders" of its own on the exhibit list.

For these reasons, the issue is moot. Regardless, Elderhostel's motion is baseless in that it does not present an accurate portrayal of the facts and circumstances surrounding this issue.

Respectfully submitted,

EXPLORICA, INC.

By its attorneys,

/s/ Mark S. Puzella

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Dated: February 11, 2010

CERTIFICATE OF SERVICE

I, Mark S. Puzella, certify that a true copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 11, 2010.

/s/ Mark S. Puzella